

MEMORANDUM

TO: Public Records Subcommittee
FROM: Bert Robinson and Lisa Herrick
DATE: October 31, 2007
RE: "Drafts" and "Personnel" Exemptions

As the subcommittee embarks into specific exemptions, we'd like to offer a few words of background.

The California Public Records Act includes a long list of specifics about records that are exempt from disclosure. That list is found in section 6254. The subcommittee is already well familiar with one part of that list, 6254(f), which covers law enforcement records. The act treats the other items on its list somewhat differently than it treats law enforcement records, however; with non-law enforcement records, the act is specific about what doesn't have to be released, rather than what does have to be released.

However, the sunshine laws we have looked to as models take a different approach. Rather than listing what personnel information should not be released, for example, Milpitas and San Francisco identify what personnel information should be released. The reason for this approach, apparently, is a concern that the exemptions in section 6254 are sometimes read too broadly.

As we interpret these portions of the San Francisco and Milpitas laws, they are intended to be read together with section 6254. So when 6254 says, "here's a broad category of information that doesn't have to be released," the SF and Milpitas laws say, in essence, "but this very specific stuff does have to be released."

The subcommittee has decided to tackle two parts of section 6254 at our next meeting: the "drafts" exemption (section 6254(a)) and the personnel exemption (section 6254(c)). We're going to take those one at a time, looking at the state law, the perceived problems with the law, and how other jurisdictions have reacted.

Drafts

The law: 6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

- (a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.

The drafts exemption, therefore, shields documents that were part of the policy formulation process, but requires the public agency to use a balancing test; any time those documents are clearly of public concern, they should be released.

According to courts interpreting the drafts exemption, “the purpose of the exemption is to provide a measure of agency privacy for written discourse concerning matters pending administrative action.” (*Citizens for A Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704.)

The problem: Much of the time, the drafts exemption is easily applied. A draft document that has a formal role in a city process, like a “Draft Environmental Impact Report” is routinely released, while a council aide’s handwritten draft of an ordinance her boss is proposing is not. However, that leaves a pretty vast middle ground. Critics argue that the phrase “not retained . . . in the ordinary course of business” is a loophole: The concern is that an agency can withhold any document found in a public file simply by saying, “Oh, that shouldn’t have been in there. We meant to throw it away.” The balancing test clause also raises concerns among those who worry that such tests offer too much discretion to policy-makers to withhold documents.

The approaches: Milpitas says that preliminary drafts and memoranda “normally kept on file” must be released. Neither of us can see much practical difference between that wording and “not retained in the ordinary course of business,” so it’s not clear what the city’s intent was with the change.

San Francisco goes further, saying that even if the document is not normally kept on file, but has been retained in a particular instance, its “factual content” must be released, while the recommendation of the author may be withheld. (This is not a crystal-clear distinction. In some cases, it would be hard to separate factual content from the author’s recommendation.)

The San Jose Mercury News/League of Women Voters/United Neighborhoods model ordinance goes further still, saying the preliminary drafts and memoranda are public if they have been retained. The ordinance dispenses with the question of whether the documents should or shouldn’t have been retained.

All three sunshine ordinances include language that protects draft documents that are part of a negotiation. It wouldn’t do, obviously, to have to disclose material that is part of a confidential negotiation to an adverse party (say the city is seeking to buy a piece of land and there is another bidder. That bidder shouldn’t see the city’s tentative deal). The San Francisco ordinance and model ordinance do require that the draft information be preserved and disclosed after the negotiations have concluded.

Personnel

The law: 6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

- c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

The California Supreme Court recently noted that “[t]he Legislature has been mindful of the right of individuals to privacy. Set forth in the [California Public Records] Act are numerous exceptions to the requirement of public disclosure, many of which are designed to protect individual privacy.” (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court of Alameda County* (2007) 42 Cal.4th 319.)

The problem: It is difficult to say, in hindsight, how broadly the legislature intended for this clause to be read. There has been a fair amount of consensus that information largely relevant to an employee’s private life – marital status, health issues, etc. – should be protected. The challenge comes when there is information that might feel private to you or me if it concerned our lives – our resume, our pay rate, our history of workplace discipline – but has some arguable public interest when it relates to a public employee. The law recognizes that the standards are different for public and private individuals: Its language about an “unwarranted invasion of personal privacy” makes clear that some invasions are warranted. But how do you sort through the specifics?

The approach: Both San Francisco and Milpitas attempt to remedy the dilemma by listing specific types of personnel information that ought to be made public. Milpitas’ list is short, including only some salary and benefits information. San Francisco also makes public the following: ethnicity, age, gender, resume information such as education and professional experience, and records of confirmed misconduct. The model ordinance mostly emulates San Francisco.

For those of you who like the primary material, here are the relevant excerpts from the other ordinances.

San Francisco Ordinance

Drafts and Memoranda.

(1) Except as provided in subparagraph (2), no preliminary draft or department memorandum, whether in printed or electronic form, shall be exempt from disclosure under Government Code Section 6254, subdivision (a) or any other provision. If such a document is not normally kept on file and would otherwise be disposed of, its factual content is not exempt under subdivision (a). Only the recommendation of the author may, in such circumstances, be withheld as exempt.

(2) Draft versions of an agreement being negotiated by representatives of the City with some other party need not be disclosed immediately upon creation but must be preserved and made available for public review for 10 days prior to the presentation of the agreement for approval by a policy body, unless the body finds that and articulates how the public interest would be unavoidably and substantially harmed by compliance with

this 10 day rule, provided that policy body as used in this subdivision does not include committees. In the case of negotiations for a contract, lease or other business agreement in which an agency of the City is offering to provide facilities or services in direct competition with other public or private entities that are not required by law to make their competing proposals public or do not in fact make their proposals public, the policy body may postpone public access to the final draft agreement until it is presented to it for approval.

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c) Personnel Information. None of the following shall be exempt from disclosure under Government Code Section 6254, subdivision (c), or any other provision of California Law where disclosure is not forbidden:

(1) The job pool characteristics and employment and education histories of all successful job applicants, including at a minimum the following information as to each successful job applicant:

- (i) Sex, age and ethnic group;
- (ii) Years of graduate and undergraduate study, degree(s) and major or discipline;
- (iii) Years of employment in the private and/or public sector;
- (iv) Whether currently employed in the same position for another public agency.
- (v) Other non-identifying particulars as to experience, credentials, aptitudes, training or education entered in or attached to a standard employment application form used for the position in question.

(2) The professional biography or curriculum vitae of any employee, provided that the home address, home telephone number, social security number, age, and marital status of the employee shall be redacted.

(3) The job description of every employment classification.

(4) The exact gross salary and City-paid benefits available to every employee.

(5) Any memorandum of understanding between the City or department and a recognized employee organization.

(6) The amount, basis, and recipient of any performance-based increase in compensation, benefits, or both, or any other bonus, awarded to any employee, which shall be announced during the open session of a policy body at which the award is approved.

(7) The record of any confirmed misconduct of a public employee involving personal dishonesty, misappropriation of public funds, resources or benefits, unlawful discrimination against another on the basis of status, abuse of authority, or violence, and of any discipline imposed for such misconduct.

Milpitas ordinance

a.) No preliminary draft or memorandum shall be exempt from disclosure under Government Code section 6254, subdivision a if it is normally kept on file. Preliminary drafts and memoranda concerning contracts, memoranda of understanding, or other matters subject to negotiation or pending council approval shall not be subject to disclosure to this provision until final action has been taken.

On personnel, the following is all that is listed:

- 1.) A listing of gross earnings by job title, including base salaries and other compensation. Other compensation shall include allowances, overtime and deferred compensation, leave cash-out payments and the percentage of base salaries that the city pays as the employer's CalPERS contribution.

Oakland, Contra Costa and Benicia

- on drafts, are largely similar to Milpitas
- on personnel, are largely similar to SF

Model ordinance:

(a) Drafts and Memoranda.

(1) Except as provided in subparagraph (2), preliminary drafts, notes, or memoranda, whether in printed or electronic form, shall be subject to disclosure, if they have been retained as of the time the request is made. This subsection does not require the retention of preliminary drafts, notes, or memoranda that would not otherwise be retained in the ordinary course of business or pursuant to a policy, procedure or practice, provided that the City shall not adopt any policy of disposing of drafts, notes, or memoranda intended solely or primarily to prevent public access to such records.

(2) Draft versions of an agreement being negotiated by representatives of the City with some other party, and all memoranda and other draft documents relating to such an agreement communicated to the other party, need not be disclosed immediately upon creation, but must be preserved and made available for public review 15 days before the meeting at which a policy body will decide whether to approve the agreement.

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(c) Personnel Information. None of the following shall be exempt from disclosure under any provision of California law that does not expressly prohibit disclosure:

(1) The job pool characteristics and employment and education histories of all successful job applicants, including at a minimum the following information as to each successful job applicant:

- (i) Sex, age and ethnic group;
- (ii) Years of graduate and undergraduate study, degree(s) and major or discipline;
- (iii) Years of employment in the private and/or public sector;

- (iv) Whether currently employed in the same position for another public agency.
- (v) Other non-identifying particulars as to experience, credentials, aptitudes, training or education entered in or attached to a standard employment application form used for the position in question.

(2) The name of every employee.

(3) The professional biography or curriculum vitae of any employee, provided that the home address, home telephone number, social security number, and marital status of the employee may be redacted.

(4) The job classification of every employee, and a description of every employment classification.

(5) The compensation and benefits paid or otherwise provided by the City to every employee, including without limitation base compensation, overtime compensation, bonuses, disability income, retirement income, and all compensation paid to any City employee by a private party pursuant to any ordinance, regulation, or contractual obligation imposed by the City.

(6) Any contract or other record specifying terms of employment of any individual city official or employee.

(7) Any memorandum of understanding between the City or department and a recognized employee organization.

(8) The amount, basis, and recipient of any performance-based increase in compensation, benefits, or both, or any other bonus, awarded to any employee, which shall be announced during the open session of a policy body at which the award is approved.

(9) The record of any confirmed misconduct of a City official or employee, and of any sanction or discipline imposed for such misconduct.